No. 12,680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NITED STATES OF AMERICA,
Appellant,

vs.

. LESTER MARKS, ELIZABETH LOY
ARKS, and HERBERT M. RICHARDS,
rustees of the Estate of L. L. Mc-
ANDLESS, Deceased,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII.

BRIEF OF TERRITORY OF HAWAII, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING

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BRIEF OF TERRITORY OF HAWAII, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING

INTEREST OF THE AMICUS CURIAE IN THIS CASE.

Of the two questions in this case, the Territory of Hawaii is interested only in the second, stated by the Court as follows:

> "whether the lands embraced in the leases were subject to withdrawal for national purposes without liability to the lessee." (Op. pp. 2-3.)

Of the two grounds of decision on this point, the Territory is interested only in the first, stated by the Court on pages 7 to 9 of the opinion (including the first paragraph on page 9 and the second sentence of the second paragraph on page 9). This part of the opinion embraces four conclusions, first, that ceded lands are subject to taking by the

United States under section 91 of the Organic Act, second, that ceded lands, though under lease, still are subject to taking by the United States under section 91 of the Organic Act, third, that the taking of the land under section 91 withdraws it from the management of the Territory, and fourth, that such withdrawal of the land under section 91 automatically frees the land from the encumbrance of a lease already made. With this fourth conclusion the Territory disagrees, because the mere existence of a power of withdrawal of land from the category of public lands for public use does not prevent vested rights from being created before the power is exercised,[1] and because the history and content of the laws governing the Hawaiian lands show the applicability of this principle.[2]

The Territory submits that under the Hawaiian Organic Act and the land laws of Hawaii approved by Congress,[2a] vested rights in ceded public lands have been created by instruments hereinafter described, issued by the proper officials of the Territory by authority of Congress; that the instruments creating such vested rights are not necessarily confined to land patents, grants or deeds parting with the fee simple title (compare footnote 13 of the opinion); and that the vested rights so created are good against a subsequent withdrawal of the land from the category of public lands for the use of the United States, entitling the holder thereof to just compensation for the taking thereof by the United States.

While the portion of the opinion argued in this brief does not affect the result in this particular case, since the

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[1] The argument on this point appears in Point I, infra.

[2] The argument on this point appears in Point II, infra.

[2a] In this brief reference to the land laws of Hawaii continued in effect by Congress will be by citation of the Civil Laws of 1897. Although the Civil Laws of 1897 were only a compilation, nevertheless as shown in section 1 of the Organic Act (48 U.S.C. 493) Congress acted upon the basis of that compilation. This Court has judicial notice of the laws of Hawaii prior to annexation. *United States* v. *Fullard-Leo,* 331 U.S. 256, 269.

portion of the opinion interpreting the provisions of the leases here involved in itself would support the result reached,[3] nevertheless the matter has a broader aspect. The opinion throws a cloud upon many land transactions entered into in good faith under the supposition that vested rights, good against the United States and everyone else, were being created. That there are grounds for that supposition we believe this brief will show.

In *United States* v. *Fullard-Leo,* 156 F. 2d 756, 758, affirmed 331 U.S. 256, this Court said that the program of Congress in respect of the ceded public lands was a benign program in which there was "no proper place for advantaging the United States at the expense of the inhabitants on grounds which, though having the semblance of legality, affront the sense of justice." The Territory feels that this quotation is apposite; an inadvertent but nevertheless fundamental disturbance of the Hawaiian land system, in effect since the inception, has occurred in this case, and can only be righted by the rehearing of this case.

Classes of transactions in the ceded public lands deemed by the Territory to create vested rights, good against the United States. The classes of transactions in the ceded public lands falling within the area covered by this brief, and deemed by the Territory to create vested rights good against the United States, in general are those made by a public auction or public drawing, after notice by advertisement.[4] The Territory deems that the following instruments, in addition to land patents, grants and deeds as to which no dispute has been presented, create vested rights

[3] Uncontested by the Territory is the Court's interpretation of the withdrawal clauses embodied in the leases here involved. This second ground of decision in itself upholds this Court's reversal of the court below. But if the petition for rehearing should be granted, holders of leases containing similar withdrawal clauses should not, we submit, be foreclosed from filing briefs as amici curiae on this point.

[4] Footnote on next page.

good against the United States. The reasons for this submitted conclusion are set forth in the argument, infra.

1. Homestead leases and agreements for the sale of homesteads,[5] made by public drawing after advertised notice, or

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[4] Section 73 (i) of the Hawaiian Organic Act (48 U.S.C. 670) requires notice by advertisement for any homestead drawing. While lands may be sold for other than homestead purposes if within the scope of the purposes stated in section 73(1) (48 U.S.C. 673) it likewise is required in case of such sale, by section 73 (i), supra, that notice by advertisement be given; pursuant to a provision of section 177 of the Civil Laws of 1897, continued in effect by Congress and still in effect as part of section 4531 of the Revised Laws of Hawaii 1945, such sales must be made at public auction.

The allotment of homesteads by drawing is required by section 73 (i) of the Organic Act (48 U.S.C. 670). However, pursuant to that section, when once offered at a public drawing a homestead may be allotted without another drawing. As to leases, section 73 (d) of the Organic Act (48 U.S.C. 665) relates to fifteen year leases of agricultural lands and requires sale thereof at public auction after notice by advertisement. Section 203 of the Civil Laws of 1897 continued in effect by Congress and now incorporated in section 4544 of the Revised Laws of Hawaii 1945, relates to twenty-one year leases and requires a public auction for the making of such leases. Moreover, section 177 of the Civil Laws of 1897, supra, used the broad word "transfer," and required that all transfers of government lands, except under the homestead laws and with other exceptions noted below, be made at public auction after advertised notice. The word "transfers" was, by Act 48 of the laws of 1893-1894, amending section 1 of chapter 44 of the laws of 1876 from which section 177 of the Civil Laws of 1897 was derived, substituted for the words "sales or leases" theretofore used in the section, with the evident intention of covering sales, leases, and every other transfer of an estate or interest in land, except under the homestead laws and with other exceptions noted below.

[5] The types of homestead leases and agreements appear infra, pp. 25-26. These transactions are governed by numerous provisions of the Hawaiian Organic Act and the Civil Laws of 1897, continued in effect by Congress. See Hawaiian Organic Act section 73 (f) - (i) inclusive, 73 (m), (n), and (p), and the last two paragraphs of 73 (q), contained in 48 U.S.C. 667-670, 674-675, 677a, and 677b; Civil Laws of 1897, sections 186, 187, 201, 212-254, continued in effect by Congress and now incorporated in the Revised Laws of Hawaii 1945, sections 4501, 4503, 4565, and Part III of chapter 78. See also footnote 34 as to the repeal of the provisions for 999 year leases, which however does not affect outstanding leases, except that the lessee is entitled to a land patent upon the payment of a fair purchase price.

if once so offered, made without such drawing and notice. These contain no withdrawal clauses but only cancellation clauses related to breaches of terms and conditions. However, in some cases there has been reserved a right of repurchase of a right-of-way at the rate of the original sale price of the lot, plus the value of crops and improvements so taken.

2. Agreements for the sale of lands for purposes within the scope of those stated in section 73 (1) of the Organic Act,[6] made by public auction after advertised notice. These likewise contain no withdrawal clauses but only cancellation clauses related to breaches of terms and conditions.

3. Leases made by public auction after advertised notice. These are of two types, the first type being non-agricultural leases, which may be made for a term of twenty-one years.[7] The leases involved in this case were such non-agricultural leases. While in practice such leases usually have contained a withdrawal clause, as did the leases here involved, nevertheless there are a number of instances of twenty-one year leases containing no withdrawal clause. These generally are leases creating rights in the nature of easements, such as rights to develop and carry away water from the water reserves, and rights for pole lines and pipelines. The origin of these easements is the opinion of assistant attorney general Willis Van Devanter, printed as Appendix II. There are outstanding forty-five leases of this kind, conferring rights that sometimes are non-exclusive but nevertheless are for a term of years; such leases contain no reserved right of cancellation for public purposes.

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[6] 48 U.S.C. 673. See also footnote 31 as to the authority for these agreements.

[7] Section 203 of the Civil Laws of 1897, continued in effect by Congress and now incorporated in section 4544 of the Revised Laws of Hawaii 1945, provides for these leases.

The second type of lease contains withdrawal provisions, but nevertheless is worthy of note. This is the agricultural lease, which may be made for a term of fifteen years.[8] In this type of lease section 73 (d) of the Organic Act (48 U.S.C. 665) mandates a withdrawal provision "for homestead or public purposes." But it is further provided in said section 73 (d) that the governor, land commissioner, and land board are empowered to omit this withdrawal provision when advantageous to the Territory of Hawaii, in cases of "the lease of any lands suitable for the cultivation of sugar cane." There are outstanding approximately forty-two leases, involving 30,704.27 acres, in which this power of omitting the withdrawal provision has been exercised. But although the printed form of lease, after providing for withdrawal for homestead or public purposes, states that "with the approval of the governor and the board of public lands, *such withdrawal provision*[9] shall not apply to any lease of any lands suitable for the cultivation of sugar cane," the form for such approval certifies that "the board of public lands of the Territory of Hawaii, pursuant to section 73 of the Hawaiian Organic Act, by and with the approval of the governor of Hawaii, authorized the sale of the foregoing lease *with the withdrawal clause for homesteading*[10] * * * omitted."

4. There are a number of other agreements which, the Territory submits, create vested rights good against the United States. These are authorized to be made without public auction or public drawing. They include, for example, a sales agreement providing for payment of the purchase price in installments, made with the holder of a preference right under section 73 (j) or section 73 (k) of the

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[8] Section 73 (d) of the Organic Act (48 U.S.C. 665) limits this type of lease to fifteen years.

[9] Italics added.

[10] Italics added.

Organic Act[11] or an exchange[12] whereby private lands are conveyed and it is agreed that the public lands given in the exchange will be conveyed at a later date by patent.

Matters outside the area of this brief. Outside of the area of argument here submitted by the Territory are the following matters:

(a) The right of the Territory and its political subdivisions to just compensation for the taking by the United States of the fee simple title to lands owned by them, that is, lands to which the United States does not hold title. (Land owned by the Territory was involved in *City and County of Honolulu* v. *United States,* No. 12376, decided April 13, 1951.)

(b) The rights of the Territory, its political subdivisions, and their licensees, in the lands set aside by executive order of the governor under section 73 (q) [13] of the Hawaiian Organic Act, or in use for wharves and landings, public building sites, parks or the like. Such lands, by definition under section 73 (a) (3),[14] are not public lands and are not here involved. The licenses here mentioned are, for example, hangar licenses at the public airports, and licenses for oil tanks at or near the public wharves for receiving the oil brought in by tankers. As to the latter, section 106[15] of the Organic Act also has bearing. This category of transactions is not involved in the present case.

(c) The rights of the Territory and the Hawaiian Homes Commission in the Hawaiian home lands designated by section 203[16] of the Hawaiian Homes Commission Act of

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[11] 48 U.S.C. 671, 672, discussed infra pp. 24-25.

[12] Exchanges are governed by section 73 (l) of the Organic Act (48 U.S.C. 673) and by section 178 and part of section 201 of the Civil Laws of 1897, continued in effect by Congress and appearing in the Revised Laws of Hawaii 1945 as sections 4535 and 4534.

[13] 48 U.S.C. 677.

[14] 48 U.S.C. 663.

[15] 48 U.S.C. 545.

[16] 48 U.S.C. 697.

1920, and the rights of lessees and licensees of such lands under instruments made pursuant to that act.[17] Such lands by the above cited statutory definition are not public lands. Moreover, the Hawaiian Homes Commission Act contains specific provisions as to federal use of such lands, which provisions are not involved here.

ARGUMENT

I.

A LAW OF THE UNITED STATES PROVIDING FOR THE TAKING OF PART OF THE PUBLIC DOMAIN FOR MILITARY OR OTHER FEDERAL USE DOES NOT VITIATE RIGHTS ACQUIRED BEFORE THE LAND ACTUALLY IS WITHDRAWN FROM THE CATEGORY OF PUBLIC LANDS FOR PUBLIC USE, AND IS NOT TO BE READ INTO THE LAW AUTHORIZING SUCH RIGHTS AS A LIMITATION UPON SUCH RIGHTS.

The taking of public lands for public use does not vitiate previously vested rights. The proposition stated in this point is sustained by *Payne* v. *Central Pacific Ry. Co.,* 255 U.S. 228, 1921, and *Wyoming* v. *United States,* 255 U.S. 489, 1921.[17a] These involved laws of Congress in the nature of offers for unilateral contracts which had been accepted by selections in accordance with the terms of the offers, and the contracts thus made were held good and not vitiated by a withdrawal of the land involved by the President, acting under the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141-142, even though the Secretary of the Interior had not yet approved the issuance of a patent. It is noteworthy that this Act of June 25, 1910 contained no clause saving rights perfected under the provisions of law that were involved in the 1921 cases decided in 255 U.S., yet

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[17] 48 U.S.C. 691-716.

[17a] See also *Payne* v. *New Mexico,* 255 U.S. 367, 1921; *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 477.

the court did not hold that the Act of June 25, 1910 under which the President acted must be read into the provisions of law under which were perfected the rights involved in the 1921 cases, and the Act of June 25, 1910 was not construed to be a limitation upon those rights. This was true even though in one of these cases (the *Wyoming* case) the rights claimed were perfected after the 1910 act was passed.

The Supreme Court in the 1921 cases distinguished the steps taken by the claimants there involved, who actually had filed their selections, from the mere taking of the initial step toward future compliance with the law (255 U.S. at p. 234). In making this distinction the Court evidently had in mind the cases relating to preemption. These cases held that under the preemption laws an entry upon lands gave only a preference right and that the United States did not, prior to the issuance of its certificate of entry, contract with the settler that the land occupied by him would be put up for sale. *Frisbie* v. *Whitney,* 9 Wall. 187, 1869; *The Yosemite Valley* case, 15 Wall. 77, 1872; *Russian-American Co.* v. *United States,* 199 U.S. 570, 1905. Where the entry has been filed before the withdrawal of the land for the use of the United States it is good against the United States. *United States* v. *Fitzgerald,* 15 Pet. 407. Under this type of statute the certificate of entry constitutes the contract of purchase. *Witherspoon* v. *Duncan,* 4 Wall. 210, 1866.

There are many types of vested rights; the nature of the particular transaction is determinative. Although, under the preemption laws, the contract is made only after full compliance of the purchaser with all requirements, other types of contracts for the sale of lands may be made by the United States. In *S.R.A. Inc.* v. *Minnesota,* 327 U.S. 558, 1946, there was involved a bilateral contract, providing for a cash down payment and annual installments. Notwithstanding the major portion of the price remained unpaid, the contract was held to transfer into private hands the

equitable title to land owned by the United States, just as in the cases above cited the unilateral contracts made when the selections were filed or the certificates of entry were issued after full performance by the prospective grantees, were held to transfer the equitable title to land owned by the United States.

A contract right which is vested in the sense of being good against the United States and only terminable by the payment of compensation is not necessarily of such nature as to transfer the equitable title to land. See *Lynch* v. *United States,* 292 U.S. 571, 1934; *Wilbur* v. *United States,* 46 F. 2d 217, 221, App. D.C. 1930. Hence the question is whether the particular instrument is one conferring a vested right. This was the approach to the problem taken by this Court in *Osborne* v. *United States,* 145 F. 2d 892, 1944. The question there involved was the right to compensation for the cancellation of a grazing privilege in the national forests. The land covered by the grazing privilege was withdrawn from all forms of appropriation under the public land laws and reserved for the use of the War Department for military purposes by a Public Land Order made under the authority of Executive Order 9146, 7 Fed. Reg. 3067. Executive Order 9146 was made pursuant to the power vested in the President by the Act of June 25, 1910 supra (43 U.S.C. 142); that statute contains no conditions preserving any rights under grazing permits. If a statutory power unconditionally reserved to withdraw land from the category of public lands were enough to dispose of the question of the effect of such withdrawal upon instruments previously issued to private parties, this Court could have disposed of the claim to compensation upon that ground. Instead this Court made no reference to the power of the President to provide for withdrawals of land from the category of public lands, but assuming such power existed, proceeded to dispose of the question of the right to compensation by analyzing the laws and regulations relating to

grazing permits, with a view to determination of the question whether it was the intent thereof to confer a vested right. It was upon the ground that under the statutes and regulations applicable thereto a grazing permit conferred no vested right,[18] and not upon the ground of a previously existing general power to withdraw land from the category of public lands, that this Court determined in the *Osborne* case that there was no right to compensation for the cancellation of the grazing permit.

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[18] The reason why the grazing permit involved in the *Osborne* case did not confer a vested right was that the statute relating to grazing upon the public domain specifically stated that grazing permits "shall not create any right, title, interest, or estate in or to the lands." While this statute in terms was not applicable to national forests, there was no statute relating to such permits in national forests, and the practice was to continue the general right of grazing when public lands were transferred to a national forest, subject however to rules and regulations for the preservation of the natural growth. Accordingly, there was no statutory authority for a regulation which purported to say that a grazing permit in a national forest had the force and effect of a contract; the Court therefore held this regulation invalid and concluded that a grazing permit did not "perfect any property right as against the Sovereign."

Cited in footnote 5 of the *Osborne* case were other instances of statutes expressly stating that the permit authorized by the statute should not be held to confer any right, easement or interest. The cases so cited were *United States* v. *Colorado Power Co.,* 240 F. 217, and *Swendig* v. *Washington,* 265 U.S. 322, 329. See also the later case of *United States* v. *San Geronimo Development Co.,* 154 F. 2d 78, (C.A. 1) 1946, a case in which Congress passed a special act authorizing a lease of land in Puerto Rico and in the same act required that the Navy Department have free use of the leased land in time of war or national emergency.

Footnote 5 of the *Osborne* case also cited as instances of permits revocable by the sovereign without compensation, cases of bridge franchises, licenses to erect river and harbor structures, and leases of submerged lands, held to have been issued subject to the requirement that there be no obstruction of navigation or impeding of improvements to navigation. The foregoing were all of the cases cited in said footnote 5 of the *Osborne* case except for a case arising in Alaska, *Berger* v. *Ohlson,* 120 F. 2d 56, which concerned the ownership of a dock built by the city of Anchorage within the Railroad Terminal Reserve set aside for the Alaska Railroad, a federal instrumentality; the dock was built by the city without any grant or lease of the site and was held not to be owned by the city.

The laws in effect in Hawaii do not resemble those considered in the *Osborne* case and the line of cases cited therein. The Hawaiian laws have some counterpart in the land laws of the United States in the Act of June 1, 1938, 52 Stat. 609, known as the Small Tract Act. The regulations under this Small Tract Act, 43 C.F.R. part 25, show that under this statute contract rights are the first step in an entry upon and occupancy of the public domain, not the last step as under the preemption laws considered in the early cases above cited; leases containing an option to purchase are provided for, and also straight leases.

The types of leases and agreements contemplated by the Hawaiian laws, the history of those laws, and the similarity of the power under section 91 to the above considered power that exists as to public lands elsewhere, whereby (without divesting rights previously acquired) public lands may be withdrawn from the category of public lands for the use of the United States, next will be considered.

II.

BY THE HAWAIIAN ORGANIC ACT AND THE CONTINUATION BY CONGRESS OF THE LAND LAWS OF HAWAII, CONGRESS AUTHORIZED THE CREATION OF VESTED RIGHTS GOOD AGAINST A SUBSEQUENT WITHDRAWAL OF THE LAND FROM THE CATEGORY OF PUBLIC LANDS FOR THE USE OF THE UNITED STATES.

Hawaiian lands are administered by express authority of Congress under special laws substituted for the existing laws of the United States pursuant to the terms of the cession. By the Hawaiian Organic Act Congress left the ceded public lands in the control of the Territory to be administered for its people. Full authority in respect of the management, administration, and disposition of the public lands was committed to the Territory by Congress.

United States v. *Fullard-Leo,* 156 F. 2d 756, aff'd on other points 331 U.S. 206. By the Organic Act, the Newlands Resolution of July 7, 1898, 30 Stat. 750, and the terms of the cession made by the Republic of Hawaii, a special trust was created under which the Territory, in essence, was the beneficial owner. *United States* v. *Fullard-Leo,* supra, 156 F. 2d 756, 759, aff'd on other points 331 U.S. 256; 22 Ops. Atty. Gen. 574, 576; 61st Cong. 2d Sess. Sen. Rep. No. 126 and H.R. Rep. No. 910 (Appendix IV).

Whether the instruments made pursuant to the powers conferred by Congress concerning the public lands of Hawaii be viewed as made by the Territory in its own right, as stated by the majority of this Court sitting en banc in the *Fullard-Leo* case (156 F. 2d at p. 760), or be viewed as made by agents of the United States, as stated by the minority of the Court in that case, it has been clear from the inception that such instruments are made (1) by express authority of the Congress,[19] and (2) under a system of land laws continued in effect from the time before annexation and substituted by Congress for the laws governing public lands of the United States, in compliance with the terms of the cession by the Republic of Hawaii and the Newlands Resolution, which required and stated that:

> "The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition."[20]

That instruments relating to the ceded lands are made by express authority of Congress is clear from the fact that

[19] The statement made in the opening brief for the United States in this case (p. 19) that "* * * * the Territory possessed the lands at the will of the United States. The Territory could not of course grant the appellees any more than it had." is inexplicable.

[20] Resolution of the Senate of the Republic of Hawaii ratifying the Treaty of Annexation of 1897; Newlands Resolution, 30 Stat. 750.

in the interim between the cession and the granting of such authority by the Organic Act all land transactions of the Hawaiian government were void,[21] 22 Ops. Atty. Gen. 574. This result would not have followed had it been possible for such instruments to issue without their necessarily being binding, if valid at all, on the United States, the holder of the title.

Congress has authorized the Territory to encumber the title of the United States not only by patents but also by leases and other forms of agreement. When the Organic Act was enacted it was provided therein:

> "SEC. 73. That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide.[22] That, subject to the

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[21] These transactions subsequently were ratified by section 73 of the Organic Act.

[22] The laws continued in effect by this provision (now section 73 (c) of the Organic Act, 48 U.S.C. 664) were contained in the Civil Laws of 1897, as changed by section 7 of the Organic Act (31 Stat. 141, c. 339) and by section 73 itself. But with later amendments of section 73 of the Organic Act extensive detailed provisions were introduced into it which necessarily superseded the early land laws to some extent. All of these changes have been reflected in the provisions of the Civil Laws of 1897 appearing in the Revised Laws of Hawaii 1945 as chapter 78. Hence, upon comparison of the sections of the Revised Laws of Hawaii 1945 with the sections of the land laws continued in effect by Congress from which they are derived, differences will appear. (The section histories in the Revised Laws of Hawaii 1945 give the references to the enactments from which the Civil Laws of 1897 were compiled, but unfortunately do not cite the 1897 compilation itself). Moreover, amendments have been made, and while certain of these amendments have been specifically approved by Congress (see for example Public 582, 80th Cong. 2d Sess. c. 385) they have not always been presented for specific approval, so that questions as to the effect of certain amendments ensue (see *Waiakea Mill Co.* v. *Vierra,* 35 Haw. 550, 554). However, if the amendments not specifically approved were supposed to be nullities the present case would not be affected thereby and there still would remain many leases and agreements unaffected thereby.

approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. In said laws 'land patent' shall be substituted for 'royal patent'; 'commissioner of public lands' for 'minister of the interior', 'agent of public lands', and 'commissioners of public lands', or their equivalents; and the words 'that I am a citizen of the United States', or 'that I have declared my intention to become a citizen of the United States, as required by law', for the words 'that I am a citizen by birth (or naturalization) of the Republic of Hawaii', or 'that I have received letters of denization under the Republic of Hawaii', or 'that I have received a certificate of special right of citizenship from the Republic of Hawaii'. And no lease of agricultural land shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than five years until Congress shall otherwise direct. All funds arising from the sale or lease or other disposal of such lands shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight: *Provided,* There shall be excepted from the provisions of this section all lands heretofore set apart, or reserved, by Executive order or orders, by the President of the United States." (31 Stat. 141, c. 339, sec. 73 as originally enacted.)

The system thus established early was clarified in correspondence with the Secretary of the Interior and Assistant Attorney General Willis Van Devanter, printed in Appendix I and Appendix II of this brief. See also 24 Ops.

Atty. Gen. 600. These show that it was recognized and intended that officers of the Territory would, under the land laws continued in effect, execute instruments of such a nature as to encumber the title of the United States, and that such instruments were not patents alone, but included leases and other forms of agreements mentioned in the Hawaiian land laws. The opinion in Appendix II took it for granted that leases and sales would create interests in the land involved, and then considered the question whether an easement could be created under the Hawaiian land laws; Assistant Attorney General Van Devanter there advised that an easement could be created, and stated that the word "license" used in the enlarged sense intended by this opinion, included a privilege coupled with an interest, not revocable at the will of the licensor.

Therefore under the Organic Act the power to make leases and sales agreements and other dispositions of land did not rest alone upon the power to "manage," contained in section 91, but more specifically upon the provisions of the land laws which, until it should otherwise provide, Congress continued in effect as constituting the "special laws" substituted for "the existing laws of the United States relative to public lands," as contemplated by the terms of the cession accepted by the Newlands Resolution.

The special laws governing the Hawaiian lands are not affected by the section 91 powers until those powers have been exercised. Congress, in section 73 above quoted, excepted from the operation of the "special laws" only lands "*heretofore* set apart, or reserved, by Executive order or orders, by the President,"[23] which clearly left these special

[23] In later amendments of section 73 this precise provision was dropped, evidently because it was functus, but it nevertheless is valuable as showing the construction placed on section 73 by Congress itself. For the present form of this provision see section 73 (a) of the Organic Act as amended, 48 U.S.C. 663.

laws fully operative as to the remaining lands until an actual taking for the use of the United States should occur under section 91, or until Congress should provide other laws under the power so to do reserved by Congress.

Section 91 as originally enacted provided:

> "Sec. 91. That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And all moneys in the Hawaiian treasury, and all the revenues and other property acquired by the Republic of Hawaii since said cession shall be and remain the property of the Territory of Hawaii." (32 Stat. 141, c. 339.)

This section was necessary because without it the President would have had no power to reserve additional Hawaiian lands for federal use pending a further act of Congress, 23 Ops. Atty. Gen. 564. The power thus reserved was a power in the President to make exceptions to the general grant of local control over the public lands in order to set apart lands for the needs of the United States; these provisions avoid interference with the general grant of local control. 28 Ops. Atty. Gen. 262, 264, relating to lands in the Philippine Islands. The conception of the Congressional scheme set forth in the cited attorney general's opinion is the opposite of the present Justice Department conception, which is that exceptions to the general grant of local control exist before the President makes them. But in *United States* v. *Fullard-Leo, supra,* 156 F. 2d 756 at p. 759, aff'd on other

grounds 331 U.S. 256, this Court held that exceptions to the general grant of local control do not exist until the President makes them. As shown in Point I this is the usual rule, that is, it is the usual rule that a power to withdraw lands from the category of public lands for the use of the United States is ineffective until exercised, and meanwhile the powers as to such lands elsewhere provided continue unaffected by the possibility of such withdrawal, leaving only the question whether rights have vested thereunder before the withdrawal of the lands from the category of public lands for the use of the United States actually occurs.

The history and content of the Hawaiian land laws and Organic Act show that these laws provide for vested rights good against a later reservation of the land for federal use. That under the land laws of Hawaii, continued in effect by Congress, leases and other bilateral agreements were to be made, conferring rights good against a later withdrawal of the land from the category of public lands for the use of the United States, appears from the nature of these instruments and other circumstances, as follows:

1. The Hawaiian land laws themselves provided for the reservation of land for public purposes; this provision was contained in section 186 of the Civil Laws of 1897, continued in effect by Congress as hereinafter explained. Land so reserved was to pass under the control of the then Minister of the Interior, as distinguished from the Commissioners of Public Lands. Section 203 of the Civil Laws of 1897, continued in effect by Congress and now incorporated in section 4544 of the Revised Laws of Hawaii 1945, provided for twenty-one year leases. Section 188 of the Civil Laws of 1897 also concerned leases of public lands, and was continued in effect by Congress and remains in effect as part of section 4543, Revised Laws of Hawaii 1945; it

provided that leases of public lands, with the exception of homestead leases,[24] might

> "contain a proviso that the Government may at any time with reasonable notice and without compensation, except for improvements taken, take possession of any part of the premises covered by such leases which may be required for laying out and constructing new roads or improving or changing the line or grade of old roads, and take from such premises soil, rock and gravel as may be necessary for the construction or improvement of such roads; provided that such privilege of taking without compensation shall not extend to such parts of such premises as are under cultivation with annual crops or sugar until such crops shall be harvested, nor to such parts of such premises as are planted and cultivated with coffee, fruit trees or other perennial crops, or occupied or improved with permanent improvements, except fences."

Hence the Hawaiian land laws clearly contemplated that leases would be binding on the lessor and create vested rights except for withdrawal rights expressly reserved in a limited class of cases, and it was not contemplated that a statutory power of withdrawal of lands from the category of public lands for use for public purposes would, without express provision therefor, be read into the lease provisions or limit the rights acquired by the lease. That this was the nature of the Hawaiian leases was recognized when Congress, by the Act of June 28, 1902, authorized the Secretary of War to acquire leases in ceded lands set aside for military purposes, and these leases were purchased. See 25 Ops. Atty. Gen. 225.

It is important to note that section 186 of the Civil Laws of 1897 (as well as sections 188 and 203) was continued in effect by Congress, so that, after giving effect to the changes made by the Organic Act, section 186 appeared in the

[24] There was no provision for withdrawal of land from homestead leases or from any type of sales agreement.

Revised Laws of Hawaii 1905 as section 262, the relevant portion of which read as follows:

> "All land hereafter reserved by the commissioner [of public lands] for public purposes, shall thereupon at once pass under the control and management of the superintendent of public works."

This provision was superseded when, by the Act of May 27, 1910, 36 Stat. 444, c. 258, section 73 of the Organic Act was amended to provide that the governor,[25] not the commissioner of public lands, should make orders reserving land for public use, which provision now is contained in 73 (q) of the Organic Act (48 U.S.C. 677).

Since the predecessor provision, section 186 of the Civil Laws of 1897, was only a provision for the withdrawal of land from the category of public lands and not a provision for its withdrawal from a lease already made, the successor provision, section 73 (q) of the Organic Act, was and is of the same nature, that is, it is a provision for the withdrawal of land from the category of public lands but is not a provision for its withdrawal from a lease already made. However, this Court's opinion assumed to the contrary, stating that appellees had conceded that the Territory, under section 73 (q), was empowered to withdraw leased lands for public purposes of the Territory. (Op. pp. 7-8.) We have read appellees' brief and do not interpret it as so conceding, but if it did so concede, it was erroneous. Section 73 (q), like its predecessor section 186 of the Civil Laws of 1897, has nothing to do with withdrawals from leases, but only section 188 of the Civil Laws of 1897 (now section 4543 of the Revised Laws of Hawaii 1945) and sec-

[25] The Committee report on this amendment (61st Cong. 2d Sess. H.R. Rep. 910) states: "Lands assigned to other departments for actual use by those departments or assigned back when no longer needed, are to be assigned by express order of the governor, and thus the status of any public land will always be a matter of certainty. At present it is sometimes difficult under the definitions of the statute to say whether a parcel is under the land or the public works department."

tion 73 (d) of the Organic Act, next considered, have to do with that subject.[26]

The analysis of the Hawaiian land laws here submitted further supports the proposition above submitted that section 91 is not a provision having to do with withdrawals from leases, and is only a provision having to do with the withdrawal of land from the category of public lands. Since Congress, in continuing the Hawaiian land laws, made a number of amendments thereto, had it intended wider provisions for withdrawal of lands from leases for federal purposes than existed under the Hawaiian land laws for the purposes of the Republic of Hawaii it would have enacted them.

2. The attention of Congress was directed to the problem of the effect of a lease in the event of subsequent withdrawal of the land from the category of public lands for use for public purposes when Congress made its first amendment[27] to section 73 of the Organic Act. This concerned the term of an agricultural lease. In the original section 73 Congress had cut this to a five year term until it should otherwise direct. In 1908 the matter of permitting a longer term had the attention of Congress, and Congress then permitted fifteen year terms, subject to the requirement that the lease provide that the land "may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes."[28] But Congress

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[26] Since section 73 (q) of the Organic Act does not, we submit, have to do with withdrawals from leases, the Act of August 21, 1941 amending that section likewise has nothing to do with withdrawals from leases. It may have some bearing on the interpretation of the withdrawal provisions contained in the terms of the leases here involved, with which this brief is not concerned.

[27] Act of April 2, 1908, 35 Stat. 56, c. 124.

[28] By the Act of July 9, 1921, 42 Stat. 116, c. 42, Congress permitted the omission of the withdrawal provision from the lease of sugar cane lands, as previously noted. The quoted provision, as amended, is now contained in section 73 (d) of the Organic Act (48 U.S.C. 665).

did not go further than to deal with the precise subject before it, which was agricultural leases, so that Congress failed to direct the insertion of a withdrawal provision in other leases.

3. That vested rights superior to a later withdrawal of the lands from the category of public lands were created by the leases made under the Hawaiian land laws, in the absence of an expressly reserved right of withdrawal from the lease, was recognized by the War Department in its report[29] on H.R. 11134 which became the Act of June 19, 1930, 46 Stat. 789, c. 546, amending section 91 of the Organic Act (48 U.S.C. 511). The problem there involved arose out of lands being taken from the ceded public lands for military use but subsequently rented by the War Department. The War Department took the position that it could not, if the lands were returned to the Territory, be assured of having them when it needed them, because the land would be placed under a lease by the Territory and could not be withdrawn therefrom. The solution worked out by the 1930 Act was to place the rentals realized by the War Department or realized under like circumstances in other cases, in the territorial treasury which was recognized to be entitled to the income.

4. The foregoing reference to the War Department having rented land set aside for its use suggests that it may have been the practice to take land for federal use as a matter of precaution on the chance that it might be needed for federal use and in advance of actual needs. Express statement of this practice is made in the Committee Report on the 1910 amendments, in the portion of the report concerning the amendments of section 91.[30] (These amendments

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[29] Contained in Sen. Rep. 866, 71st Cong. 2d Sess. The entire Committee Report is printed as Appendix III.

[30] This portion of the report, H.R. Rep. 910, 61st Cong. 2d Sess., is printed as Appendix IV. The section amending section 91 of the Organic Act was section 8 of the bill, but as finally enacted was section 7.

provided for the restoration to the Territory by the President of land previously taken for federal use.) That the practice existed of setting land aside in advance of actual federal needs is indicative of the view that the land, if left in territorial management until actually needed, would not be free of the encumbrances placed on it by the Territory under the Hawaiian land laws.

5. That vested rights which are good as against later military needs are created by agreements of sale made under the Hawaiian Organic Act and Hawaiian land laws[31] was recognized by Congress in enacting the Act of August 7, 1946, 59 Stat., c. 771. The problem there involved is set forth in the committee reports.[32] The purpose of this 1946 Act was to prevent forfeitures by purchasers of land whose land later was needed for the prosecution of the war or national defense. The forfeiture against which protection was provided was one which would result from non-performance of building conditions and the like, specified in the terms of purchase; it was assumed by Congress and tacitly recognized to be the law that land purchases were not vitiated by the land being taken over for military pur-

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[31] These agreements of sale are limited to sales for purposes stated in section 73 (l) of the Organic Act (48 U.S.C. 673), unless for homestead purposes or authorized by one of the special provisions previously mentioned relating to preference rights, land exchanges, and the like. Section 201 of the Civil Laws of 1897 provided for the sale of public lands "upon part credit and part cash" under an agreement that could require improvement of the premises and "shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions." These provisions were continued in effect by Congress and now appear in section 4565 of the Revised Laws of Hawaii 1945. The section is headed "special homestead agreements" but as the footnote shows the section also applies to other sales. In the Civil Laws of 1897 the section was not limited to homesteads. The validity of these sales agreements is recognized by Congress in the Act of August 7, 1946 here discussed.

[32] H.R. Rep. No. 2462, 79th Cong. 2d Sess. printed as Appendix V, and Sen. Rep. 1762 which is similar. The Act of August 7, 1946 also appears in Appendix V.

poses. This basic assumption was not confined to purchases that had reached fruition in the form of a patent, grant or deed, for agreements specifically were mentioned and protected against forfeiture by reason of non-performance of the terms of the purchase.

In the 1946 Act Congress provided that where the purchaser's non-performance was due to his inability to comply with the terms of the sale during the period of United States occupancy he should be granted an additional period for compliance with such requirements, equal to the period of United States use, whether such use was "under lease or license from the owner thereof or otherwise." Congress specifically provided that this should be an enactment of a continuing nature, applying in any future similar case, hence applicable to any sales agreement.

6. By the Act of July 9, 1921, 42 Stat. 116, c. 42, amendments were made of the preference provision that had been enacted in 1910 to give a preference right of purchase to persons who had resided on a parcel of public lands for ten years and had improved it. These amendments allowed this right of preference to be transferred to other land in case the parcel of land so resided upon and improved was "reserved for public purposes, either for the use of the United States or the Territory of Hawaii."[33] This preference right of purchase (together with a similar preference right contained in section 73 (k) of the Organic Act, 48 U.S.C. 672) constitutes the only portion of the laws governing Hawaiian lands that resembles the preemption rights in the laws governing public lands elsewhere.

As held by the early cases relating to public lands of the United States, supra, p. 9, preemption rights did not amount to a contract of sale until the land office issued its certificate of entry, which was issued only after the would-be purchaser had made full compliance with all requirements.

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[33] Section 73 (j) of the Organic Act, 48 U.S.C. 671.

The hardships inherent in laws that contemplated entry, settlement and full performance by the homesteader before he had any contract for the purchase of the land, were recognized by the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 142, which provided that withdrawals of land for public use should be subject to valid settlements already made on the land. The Congress thereby established the policy of recognizing, in the event of such a withdrawal for public use, a homestead claim that had not become a vested right. See *Stockley* v. *United States,* 260 U.S. 532, 544. The 1921 amendments of the Hawaiian Organic Act allowed relief in somewhat similar cases in Hawaii by allowing the preference right to be transferred to other land. Although Congress in 1921 was making a complete revision of section 73 of the Organic Act, no such provision was enacted as to the homestead leases and homestead agreements next considered. None was necessary. In the case of a homestead lease or homestead agreement a homesteader obtained his contract rights before he entered on and improved the land, not afterward.

The homestead leases and homestead agreements provided for by the Organic Act and land laws continued in effect by Congress were of the following nature. After being allotted a tract of land at a public drawing, (1) the homesteader entered under a certificate of occupation entitling him after six years residence on and improvement of the land to a 999 year lease,[34] or (2) the homesteader received a right of purchase lease for a term of twenty-one years with an option to purchase entitling him to a land

[34] Civil Laws of 1897, sections 216, 219, continued in effect by Congress and appearing in the Revised Laws of Hawaii 1945 as sections 4570 and 4573 but since repealed by the Act of September 1, 1950, Public 746, 81st Cong. 2d Sess., c. 833. The repeal does not affect outstanding leases; however, the 1950 act entitles such a lessee to a land patent upon the payment of a fair purchase price.

patent upon the meeting of all conditions,[35] or (3) the homesteader received a cash free home agreement entitling him to a patent at the end of three years upon the meeting of all conditions,[36] or (4) the homesteader received a special homestead agreement, entitling him to a land patent upon the meeting of all conditions.[37] See also section 73 (h) of the Organic Act (48 U.S.C. 669) as to violations which would cause the land to "resume the status of public land."

On the view here submitted that homestead leases and agreements created vested contract rights good against a subsequent withdrawal of the land from the category of public lands for public purposes of the United States or the Territory, these homesteaders, as distinguished from those who had settled on the land without receiving contract rights, were protected by their contracts and needed no other protection, which explains why no provision enabling them to transfer their claims to another parcel of land was enacted for them.

CONCLUSION

The Territory submits that the petition for rehearing should be granted in order that further consideration may be given by this Court to the structure of laws governing the ceded public lands of Hawaii. In view of the jurisdiction of this Court over such matters, the opinion throws a cloud upon many land transactions entered into in good faith. Upon a more full consideration of the governing laws this cloud will, the Territory believes, be removed.

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[35] Civil Laws of 1897, sections 245 and 248, continued in effect by Congress and appearing in the Revised Laws of Hawaii 1945 as sections 4597 and 4599.

[36] Civil Laws of 1897, section 252, continued in effect by Congress and appearing in the Revised Laws of Hawaii 1945 as section 4601.

[37] Civil Laws of 1897, section 201, continued in effect by Congress; the relevant portion appears in the Revised Laws of Hawaii 1945 as section 4565.

For under the laws governing these ceded public lands, homestead leases, agreements for the sale of homesteads, other agreements for the sale or conveyance of lands, and leases containing no express withdrawal provisions, create vested rights good against a subsequent withdrawal of the land from the category of public lands for the use of the United States.

DATED at Honolulu, T. H., this 1st day of May, 1951.

WALTER D. ACKERMAN, JR.
Attorney General of the
Territory of Hawaii

RHODA V. LEWIS
Deputy Attorney General of the
Territory of Hawaii

FRANK W. HUSTACE, JR.
Deputy Attorney General of the
Territory of Hawaii

On Behalf of the
Territory of Hawaii
As Amicus Curiae

APPENDICES

(Indexed in the Subject Index)

APPENDIX

APPENDIX I

APPENDIX TO THE REPORT OF THE COMMISSIONER OF PUBLIC LANDS, TERRITORY OF HAWAII, FOR THE YEAR 1900.

"In relation to questions that were raised by the United States District Attorney as to the legality of Hawaiian land transactions since September, 1899, I would beg to submit copies of correspondence and statements that actually took place in regard to the matter, as an appendix to the foregoing report; as follows:

SCHEDULE A

John C. Baird,
U. S. Attorney.

DEPARTMENT OF JUSTICE.
Office of
UNITED STATES ATTORNEY,
District of Hawaii.

Hon. Jacob F. Brown,
Land Commissioner of Hawaii, City.

Honolulu, Nov. 5th, 1900.

Dear Sir:—I have the honor to respectfully apply for information from your office concerning the following matters of business relating to public property in the Territory of Hawaii, and originating on and after Sept. 23, 1899, to wit:

Leases of public lands: the names of the lessees and their assignees, if any, descriptions of the lands and acreage leased, and termination of leases; also the dates of the same.

Sales of public lands: the names of the purchasers and their assignees, if any, description of the lands and acreage sold, and dates of deeds, or patents.

Contracts for sales of public lands: The names of the purchasers and their assignees if any, descriptions of the lands and acreage contracted for, and dates of contracts.

Sales or contracts for sale of, or leases of, Water Rights: The names of purchasers, and their assignees, if any, description of water rights, including the name and location of the stream or body of water drawn from, location of the point of division, and quantity of water so disposed of, and the acreage to be irrigated thereby, if known. Also dates of the instruments of conveyance or agreement.

Advertisements of sale or for tenders respecting public lands or water rights now pending.

I trust that it will not seriously inconvenience your office to furnish the information desired.

Yours respectfully,

(Signed.) JOHN C. BAIRD,
United States Attorney for Hawaii.

COMMISSION OF PUBLIC LANDS,
TERRITORY OF HAWAII,

Honolulu, Nov. 9th, 1900

John C. Baird, Esq.,
United States Attorney for Hawaii.

Dear Sir:

Enclosed please find copies of official correspondence in reference to Public Land matters as follows:

Letter of Governor Dole to the Secretary of Interior, Washington, in reference to Homestead and Right of Purchase Leases, and reply of Thos. Ryan, Esq., Acting Secretary, thereto.

Letter of F. L. Campbell, Acting Secretary of Interior Department to Governor Dole enclosing opinion of Willis Vandevanter, Assistant Attorney General for Interior De-

partment, in re the issuance of Land Patents in the Territory of Hawaii.

I take the liberty to enclose also a statement of the view held in this office of the laws applying to the public lands of the Territory, and under which all recent transactions have been made. A detailed statement of these is well advanced and will be presented to you shortly.

Yours respectfully,

(Signed) JACOB F. BROWN,
Commissioner of Public Lands,
Territory of Hawaii.

EXECUTIVE CHAMBER,

Territory of Hawaii,

Honolulu, July 10th, 1900.

Honorable E. A. Hitchcock,
Secretary of the Interior,
Washington.

Sir:—

Section 74 of an Act to Provide a Government for the Territory of Hawaii, enacts that "no lease of agricultural land shall be granted, sold or renewed by the government of the Territory of Hawaii, for a longer period than five years, until Congress shall otherwise direct."

I desire instructions whether this provision applied to Homestead Leases and Right of Purchase Leases. The law for Homestead Leases which will be found in the Civil Laws of the Hawaiian Islands, sections 212 to 238 inclusive, provides special proceedings for settling persons on small homesteads. Although the holding is called a lease, it is hardly so in any legal sense, inasmuch as no rent is reserved and the term of the occupation is 999 years; in other words

permanent. It is really a fee to the holder and his heirs, without the right of alienation. To apply the above quoted provision to the homestead lease legislation would render wholly nugatory a most valuable enactment for the settlement of persons on small holdings, which is of particular importance to native Hawaiian and other persons who may have little capital and not a large endowment of thrift.

The Law for Right of Purchase Leases is from section 239 to section 248, of the Civil Law, both inclusive.

The legislation providing for Right of Purchase Leases, establishes a system of land settlement in small holdings, which has been more successful and popular than any of the other methods devised by the Hawaiian Land Act of 1895. The successful applicant receives a lease for 21 years, which fixes the value of the land for the term of the lease, as between the government and the lessee and the performance of certain reasonable conditions of residence and improvement, allows the lessee to acquire a fee simple title by purchase at any time before the last year of the lease. This allows the settler to use his capital at the outset for improvements and cultivation, and to put off the day of purchase until he is well established.

If the provision of the Territorial Act above quoted, applies to Right of Purchase Leases, it renders this system substantially impracticable.

In both of the cases referred to, such a result would seriously interfere with the policy of land settlement in small holdings.

I submit that a reasonable construction of the Territorial Act excludes the application of the provision in question from Homestead leases and Right of Purchase Leases, for these reasons:

1st. The fact that Congress has for the most part continued the Hawaiian Land Laws in force (section 73 and 99) which laws are based largely upon a policy of land set-

tlement in small holdings, militates against a construction that would interfere with such a policy.

2nd. The Congressional discressions of Hawaiian matters showed that the prevailing sentiment of both Houses was in favor of such a land policy, and radically opposed to any legislation that would give corporations an opportunity to acquire lands in fee to any great extent. This being so Congress could not have intended to interrupt the legislation already in existence for land settlement in small holdings.

3rd. The word "lease" used in the provisions referred to, not being connected with the words extending its meaning, must be taken in its ordinary sense, which is a simple lease for a term conditioned upon payment of rent and under which all right of occupation terminates at the expiration of the term.

Yours very respectfully,

(Signed.) SANFORD B. DOLE.

DEPARTMENT OF THE INTERIOR,
WASHINGTON,

P. and M. Div. July 27, 1900.

Hon. Sanford B. Dole,
Governor of Hawaii,
Honolulu, Hawaii.

Sir:—

The Department is in receipt of your communication of the 10th instant, desiring instructions as to whether the provision in section 73 of an Act of Congress entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900, "and no lease of agricultural land shall be granted, sold or renewed by the government of the

Territory of Hawaii for a longer period than five years until Congress shall otherwise direct," applies to Homestead Leases and Right of Purchase Leases.

Said Section 73 provides:

That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this act, shall continue in force until Congress shall otherwise provide.

An examination of the laws of Hawaii in connection with the provision of the Territorial act referred to by you leads to the conclusion that your opinion that it was not intended that said provision should apply to Homestead Leases or Right of Purchase Leases is justified. The Homestead being for nine hundred and ninety-nine years and reserving no rent is, as you say, in effect the conveyance of the fee and is given after compliance with certain requirements as to residence upon and improvement and cultivation of the land very similar to the requirements of the homestead law in force in other parts of the United States.

The so-called Right of Purchase lease is a part of the proceedings in another method for the acquisition of public lands. It was evidently not intended to change the existing provisions of the Hawaiian law by which title the public lands may be acquired, but it was the intention to continue those provisions in force for the present, at least.

You are therefore instructed that the provisions of the Territorial act referred to does not apply to Homestead Leases or Right of Purchase Leases.

Very respectfully,

(Signed.) THOS. RYAN,
Acting Secretary.

EXECUTIVE CHAMBER,

Territory of Hawaii,

August 21st, 1900.

The Honorable
E. A. Hitchcock,
Secretary of the Interior,
Washington.

Sir:—

Some doubt exists in my mind as to the execution of land patents and other instruments for the disposition of public lands.

Our land laws as amended by the Territorial Act, provide that land patents shall be signed by the governor and countersigned by the Commissioner of Public Lands and that the said commissioner may make leases.

These provisions of law are supposably in force under section 73 of the Territorial Act. Section 458 of the Revised Statutes of the United States, 2nd edition 1878, provides that patents issuing from the General Land Office shall be issued in the name of the United States and be signed by the President and countersigned by the Recorder of the General Land Office. Sections 450 and 451 of the Revised Statutes, same edition, authorize the President with the advice and consent of the Senate, to appoint a secretary and assistant secretary, "whose duty it shall be under the direction of the president to sign in his name and for him patents for land sold or granted under the authority of the United States."

Does this provision bear upon the execution of land patents under the laws of the Territory of Hawaii, or shall I proceed in such matters under the provisions of our laws, regardless of these provisions of the Revised Statutes?

Very respectfully,

(Signed.) SANFORD B. DOLE.

DEPARTMENT OF THE INTERIOR.

Washington,

October 24, 1900.

The Governor of Hawaii,
Honolulu, H. I.

Sir:—

Your letter has been received, in which, after referring to the provisions of Section 450, 451 and 458 of the Revised Statutes of the United States, relative to the issuing of Land Patents, you inquire as to whether these provisions govern in the executions of Land Patents under the laws of the Territory of Hawaii.

In response thereto, I transmit herewith for your information a copy of an opinion of the Assistant Attorney General for the Interior Department to whom the matter was referred, in whose conclusion that, for the present, the existing laws of the Territory of Hawaii govern the execution of Land Patents, I concur.

Very respectfully,

(Signed.) F. L. CAMPBELL,
3338, Acting Secretary.
2864.

2864-1900
P. and M. Div.

DEPARTMENT OF THE INTERIOR.
Office of the Assistant Attorney-General,

Washington, October 16, 1900.

The Secretary of the Interior,
Sir:—

I am in receipt by your reference with request for an opinion upon the question presented therein, of a letter from the Governor of Hawaii in which, after referring to the provisions of the Revised Statutes (Secs. 450, 451, and 458), relating to the issuing of land patents, he says:

Does this provision bear upon the execution of land patents under the laws of the Territory of Hawaii, or shall I proceed in such matters under the provisions of our laws regardless of these provisions of the Revised Statutes?

Said sections provide in substance that the President may appoint a secretary to sign his name to patents for land sold or granted under authority of the United States and that all patents issuing from the General Land Office shall be issued in the name of the United States and be signed by the President and countersigned by the Recorder of the General Land Office.

The Joint Resolution of July 7, 1898 (30 Stat., 750), accepting the cession of the Hawaiian Islands provides as to the public lands as follows:

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition.

Provision was made for the government of the Territory of Hawaii by the Act of April 30, 1900 (31 Stat., 141). By section 73 of that Act it is provided:

That the laws of Hawaii relating to public lands, a settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this Act, shall con-

tinue in force until Congress shall otherwise provide. . . . In said laws "land patent" shall be substituted for "royal patent"; "commissioner of public lands" for "minister of the interior," "Agent of public lands," and "commissioners of public lands" or their equivalents.

Section 9 of said Act provides:

That wherever the words President of the Republic of Hawaii or Republic of Hawaii, or Government of the Republic of Hawaii, or their equivalents, occur in the laws of Hawaii, not repealed by this Act, they are hereby amended to read "Governor of the Territory of Hawaii," or "Territory of Hawaii," or "Government of the Territory of Hawaii" or their equivalents as the context requires.

Provisions as to the preparation, execution and issuance "Royal Patents" and "Land Patents" are found in sections 171, 172 and 200 of the laws of Hawaii (1897) none of which sections is found in the list of Acts, Chapters and Sections of the laws of Hawaii, specifically repealed by said Act of Congress of April 30, 1900, *Supra.*

These sections are changed by the substitution and amendments made by the Act of Congress are in force and are to remain in force until Congress shall otherwise provide. Thus a system differing from that provided by the Revised Statutes is for the present provided for the Territory of Hawaii. The provisions thus made applicable to this Territory must control.

The paper submitted is herewith returned.

Very respectfully,

(Signed.) WILLIS VAN DEVANTER,
Assistant Attorney General.

Department of the Interior, October 16, 1900.

Approved.

(Signed.) F. L. CAMPBELL,
Acting Secretary.

COMMISSION OF PUBLIC LANDS.

The Joint Resolution of Annexation approved July 7th, 1898, provided that "the existing laws of the United States relative to Public Lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition."

Until Congress should enact such laws, no power existed in their local government to alienate or change the status of the Public Lands in Hawaii, and although under a misunderstanding of the purport of this clause of the resolution, certain transactions in public lands were made before Congress had enacted these special laws, such transactions were annulled by President McKinley under date of September 11th, 1898, upon the opinion of the Attorney General of the United States that such transactions were without warrant of law.

Congress has since, however, enacted the special laws required by the resolution of annexation, and by "An Act to Provide a Government for the Territory of Hawaii," approved April 3rd, 1900, has specifically enacted by Section 73 of said Act "that the laws of Hawaii relating to public lands, the settlements of boundaries and the issuance of patents on land commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide": and such intended continuance is emphasized by the changes made to adapt such laws to the new conditions after the taking effect of the Act.

The continuance of the Land Laws of Hawaii by the Organic Act of April 3rd, 1900, could not, however, affect those transactions that had been annulled as aforesaid, and an additional clause therefore appears in the said Section 73 ratifying and confirming, subject to the approval of the President, all sales, grants, leases and other dispositions of

the public domain and agreements concerning the same, and all franchises granted by the Hawaiian Government in conformity with the laws of Hawaii between the seventh day of July, 1898, and the twenty eighth day of September, 1899.

It has been suggested that the continuance of the laws of Hawaii as enacted in Section 73 has reference only to those transactions between July 7th, 1898 and September 28th, 1899, but this appears to this office wholly untenable for the following reasons:

If any such limitation of the law was intended, such intention would certainly and easily have been stated, rather than the clear and unmodified statement that the existing laws should remain in force until Congress should otherwise provide.

The changes made in the Laws of Hawaii by Section 73 are meaningless and useless as limited to those transactions between July 7th, 1898, and September 28th, 1899.

The provision that no lease of agricultural land shall be made for longer period than five years is useless in reference to the transactions between those dates. Those transactions are fully ratified and confirmed by Congress subject only to the President's approval: the amendment as to the five year lease has value only as applied to new transactions.

Of still greater significance, however, is the change in the laws made by Section 73 in substituting the words "I am a citizen of the United States" or "that I have declared my intention to become a citizen of the United States, as required by law" for the words, "that I am a citizen by birth (or naturalization) of the Republic of Hawaii," etc.

This change is absolutely unnecessary as applying to any old transactions, for these words are used only in the original applications for lands under the various systems. What is the meaning of this change in connection with lands not only applied for months before, but sold, granted and leased

already and which sales, grants and leases Congress ratifies and confirms, subject only to approval of the President? This change evidently is made with reference to the transactions that should ensue after the passage of the Territorial Act. In brief, the changes in the laws provided by Section 73 are necessary only in case the land laws of Hawaii were continued in force for the disposition of new lands.

They are superfluous, meaningless and misleading as limited to the transactions from July 7th, 1898 to September 28th, 1899.

No one questions that the title to the public lands of this Territory is in the United States and probably no one questions that Congress may make such disposition of those lands as it sees fit. It has, by Section 99, definitely asserted the title to the lands known as Crown Lands and makes the same "subject to alienation and other uses as provided by law."

Such law has been provided by Section 73 which, making certain changes to adapt existing laws to new conditions, thereupon continues the existing laws until Congress shall otherwise provide. These laws are full and explicit. They cover the case of each and every transaction since the passage of the Act, and are understood by this office to be the clear statement of the methods by which Congress has for the present chosen to dispose of Public lands in Hawaii.

It is claimed that as the title to these lands is in the United States, and no formal cession has been made back to the Territory of Hawaii, that the local authorities are powerless to dispose of any portion of the same. Without assuming to discuss the technical points that might be raised in this connection, I would submit that it is not held by this office, that these lands are the property of the Territory to be disposed of under local laws. It is held that they are lands of the United States to be disposed of as Congress has directed and shall direct—in other words, that the existing

land laws are not the local laws of the Territory of Hawaii, but special laws of the United States Congress applying to the Public lands in said Territory: and that Congress in explicitly continuing these laws practically re-enacted them and all their provisions as laws of the United States, subject to the modifications and changes that had been deemed necessary.

Section 91 of the Organic Act, commits to the possession, use and control of the Government of the Territory of Hawaii, to be maintained, managed and cared for at the expense of the Territory, until otherwise provided by Congress, "the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of Annexation approved July 7th, 1898.

The above is a general enactment covering numerous classes of property ceded under the joint resolution, and is subject to special enactment in regard to any particular class or portion of the property. Congress has "otherwise provided" for the disposition of the Public Lands of the Territory by Section 73, by the same section reserving to itself the right of any further provisions.

The enclosed correspondence from the Department of Interior, Washington, appear in strong confirmation of the views stated above.

The opinion of Mr. Vandevanter, Assistant Attorney General for the Department of the Interior, is in effect, that Section 73 of the Organic Act continues to local authorities the power to issue Land Patents for the Public Lands of this Territory.

If this important authority is so continued, it appears reasonable to suppose that all the provisions of the laws of Hawaii relating to public lands are continued, with the modifications and changes made by Congress, in full force and effect until Congress shall otherwise provide.

In endorsing the view of Governor Dole in the matter of

Homestead and Right of Purchase Leases, Mr. Ryan, Acting Secretary, very directly states: "It was evidently not intended to change the existing provisions of the Hawaiian Laws by which title to the Public Lands may be acquired, but it was the intention to continue those provisions in force for the present at least."

Consideration of the original report of the Commission appointed to formulate an Act for the Government of the Territory of Hawaii, of Senate and House discussions, and the evidence of parties present at the hearing in committee pending the passage of the Organic Act, leaves, in the opinion of the undersigned, no doubt of the intention of Congress in this matter, which intention it is believed, is clearly expressed in the Act approved April 3rd, 1900, and to which it has been the purpose of this office to conform.

I have the honor to be

Yours very respectfully,

JACOB F. BROWN,
Commissioner of Public Lands,

Nov. 9th, 1900. Territory of Hawaii.

John C. Baird, Esq.,
United States Attorney for Hawaii.

COMMISSION OF PUBLIC LANDS.

Honolulu, H. T.,
November 12th, 1900.

John C. Baird, Esq.,
U. S. Attorney for Hawaii.

Dear Sir:—

In reply to the request for information contained in your communication of November 5th, I beg to submit the following statements.

You will note that after the date of September 28th, 1899, no transactions are recorded until after June 14th, 1900, the date of the taking effect of the Act to provide a Government for the Territory of Hawaii, as approved April 30th, 1900.

Understanding your request to apply only to transactions originating on or after September 28th, 1899, I have not included transactions in continuance or completion of any contracts, agreements, or dispositions of Public lands originating before such date.

For your further information in this matter, I beg to call your attention to the fact that there is a class of Public land not within the control or management of this office.

This class of lands is referred to in Section 186 of "Civil Laws," as follows:

"Provided, however, that this Act shall not apply to the following classes and descriptions of land, the property of the Government, all of which shall remain under the control and management of the Minister of the Interior.

"Town lots, sites of public buildings, land used for public purposes, roads, streets, landings, nurseries, tracts reserved for forest growth, and conservation of water supply, parks and all lands which may hereafter be used for public purposes. All lands hereafter reserved by the Commissioners for public purposes, shall thereupon at once pass under the control and management of the Minister of the Interior."

By the Act to organize the Government of the Territory of Hawaii, the duties of the "Minister of the Interior" in this connection, devolve upon the Superintendent of Public Works and information as to transactions on the class of lands referred to should be obtained from the office of Public Works, this office not having official knowledge of such transactions.

PUBLIC LANDS NOTICE.
OLAA TRACT, PUNA, HAWAII.

[Terms of the notice omitted.]

OLAA SALE.

[List of 86 lots sold at this sale omitted.]

The foregoing sales in Olaa, Puna, Hawaii, were made in accordance with Sec. 201 of "Civil Laws," at public auction in Hilo, Hawaii, Sept. 20th, 1900, on the terms and conditions set forth in printed notice enclosed.

The land was sold in lots of about 50 acres each, and is covered with heavy forest and jungle growth characteristic of the wet districts of Hawaii, being suitable, after clearing, to cultivation of coffee, sugar-cane, citrus fruits and general products.

The amount thus sold, about 4000 acres, is portion of a large tract having the same general qualities and a total area of about twenty thousand acres which has all been carefully surveyed and upon which an expenditure for surveys and the building of roads has been made by the local authorities to the amount of thirty or forty thousand dollars.

These lands are connected by good roads with the town of Hilo, and lie from ten to twenty miles from same.

The accompanying list of purchasers was prepared immediately after the sale and is presumably complete.

The agreements of sale to be made with purchasers for these lots, have not yet been executed but are in process of execution in the Sub-Agent's office in Hilo, to be presented at this office for signature.

SPECIAL AGREEMENT.

Date of Agreement	Purchaser	Area	Location	Purchase Price
Aug. 1, 1900	James D. Dole	61 Acres	Lot 10, Wahiawa Waialua, Oahu	$4,000.00

The above agreement of sale was made under Section 201 of "Civil Laws," the land concerned having been sold

at public auction in Honolulu, July 28th, 1900, for the purchase above.

This lot is agricultural land about 20 miles from Honolulu, at an elevation of about 1200 feet. It is open land suited to general farming purposes and was sold under conditions as follows:

One-fifth of the purchase price cash, the remainder in four equal installments. Purchaser to maintain his home continuously on the premises from the end of first to end of fourth year of agreement.

Twenty-five per cent of the land to be put under bona-fide cultivation by end of fourth year.

The above conditions are embodied in the agreement of sale duly issued and noted above.

CASH SALE.

Date of Sale	Purchaser	Area	Location	Purchase Price
Oct. 22, 1900	Mrs. S. C. Allen	50 Acres	Ewa, Oahu	$315.00

The land concerned above is a small lot of swampy land, portion of old fish pond on the line of Oahu railway about 10 miles from Honolulu.

No Land Patent or deed for above lot has yet been issued.

GENERAL LEASES.

Date of Lease	No.	Lessee	Term	Area	Location	Annual Rental
Sept. 1, 1900	528	A. Enos & Co.	5 yrs.	25,000 Acres	Kahikinui, Maui	$3,010.00

The above lease was made upon sale at auction, September 1st, 1900, after 30 days' public notice. The lease is for term of five years from Feb. 1st, 1901, expiring Feb. 1st, 1906.

This tract of land estimated at 25,000 acres, covers the arid and almost waterless lands of the Kahikinui district, Maui. A large portion of this land is represented by absolutely barren lava flows. It has, however, a reasonable amount of pasture in favorable seasons and brackish water

is obtained at the coast. This Kahikinui district appears practically devoid of agricultural possibilities, but the lease provides for the taking up of any land without reduction in rent, if the same is desired for settlement.

Lease further requires an annual expenditure of $200 in eradicating lantana from the land.

The rental obtained is considered by this office a good one.

GRANT OF RIGHT OF WAY.

Date	Grantee	Location	Annual Fee
Nov. 1, 1900	Theo. F. Lansing	Waiahole, Oahu	$10.00

The above is a grant of right of way for a pipe line for conveyance of water across public land at Waiahole, Koolau, Oahu, and between certain lands owned by the grantee. This right of way is granted for thirty years at an annual fee of Ten Dollars in accord with intent and purpose of "An Act to regulate the acquisition of Right of Way over the lands of others," approved August 13th, 1895. (See Civil Laws) Chapter 114, and is for right of way only, not conferring any water rights.

WATER RIGHTS.

No leases, sales or contracts have been completed with reference to any water rights since the date of September 28th, 1899.

A lengthy consideration has been given, however, to the joint application of the Waialua Agricultural Co. and the Hawaiian Fruit and Plant Co., to enter upon certain Public land in Waialua district for the purpose of constructing dams, reservoirs, flumes, etc., for the utilization of lands of those companies lying below. The matter is somewhat complicated and difficult of clear explanation, but is substantially as follows:

[Explanation of this matter omitted.]

The foregoing is a full statement of the transactions of this office September 28th, 1899, to date, other than the usual routine work of the office and such transactions as applied to matters originating before that date.

I remain,

Very respectfully,

J. F. BROWN,
Commissioner of Public Lands,
Territory of Hawaii.

John C. Baird,
U. S. Attorney.

Department of Justice.
Office of
United States Attorney,
District of Hawaii.

J. F. Brown, Esq.,
Commissioner of Public Lands,
Honolulu, Hawaii.

Honolulu, Nov. 12, 1900.

Dear Sir:—

I beg to acknowledge receipt of your letter of this date inclosing statement requested by my letter of the 5th inst. and covering "the transactions of this (your) office from September 28, 1899, to date, other than the usual routine work of the office and such transactions as applied to matters originating before that date."

Thanking you very kindly for your courtesy in the premises, I remain,

Yours very respectfully,

(Signed.) JOHN C. BAIRD.

SCHEDULE B

EXECUTIVE CHAMBER.

Honolulu, November 9th, 1900.

The Honorable E. A. Hitchcock,
Secretary of the Interior,
Washington, D. C.

Sir:—

Mr. J. F. Brown, Commissioner of Public Lands, informs me that Mr. Baird, District Attorney at the Federal Court of the Territory of Hawaii, has recently told him that he has been instructed to enquire into the legality of Hawaiian land transactions since September, 1899, with authority to contest their validity, and that he is of the opinion that there is no authority in the Territorial Government to sell public lands.

Upon the going into effect of the "Act to provide a government for the Territory of Hawaii," on the 14th of June last, with the provisions contained in sections 73 and 91 of the same relating to the Hawaiian public lands, I supposed that authority was thereby conferred upon the Territorial Government to dispose of public lands in the Territory under the provisions of the "Laws of Hawaii relating to Public Lands."

The limitations of leases of agricultural lands to terms of five years as provided in said section 73, raised a doubt in my mind as to Homestead Leases and Rights of Purchase Leases, whether such limitation applied to them, and I wrote you for instructions in the matter July 10th. Your letter, dated July 27th, was duly received by me. This letter stated that such limitation does not apply to Homestead Leases and Right of Purchase Leases, and explains that "it was evidently not intended to change the existing provisions of the Hawaiian law by which title to the public lands may be acquired, but it was the intention to continue those provisions for the present at least."

With this letter, together with the provisions of the Organic Act referred to, my mind was clear as to the authority of this Government to act under the Hawaiian laws and the Territorial Act in the matter of land transactions, and the Commissioner of Public Lands was instructed to proceed with the work of his department.

Mr. Brown has taken up the work of furnishing land to settlers in several directions, and has in Olaa, Hawaii, disposed of a considerable number of holdings upon conditions of time payment, residence and improvement. These intending settlers would be much prejudiced if their interests already acquired in these holdings should be set aside as invalid, or even if doubt and uncertainty should be thrown upon them by litigation.

There is a considerable demand for lands for settlement purposes from Hawaiians, Portuguese and Americans and probably from persons of other nationalities, and it seems important from a public standpoint that the work of furnishing such persons with homesteads should not again be brought to a standstill.

I need hardly call your attention to the embarrassment which such action would cause the Territorial Government by making it appear either that it does not understand its duties or is not anxious to keep within its authority.

I have the honor to be, Sir,

Very respectfully,

(Signed.) SANFORD B. DOLE.

DEPARTMENT OF THE INTERIOR.

Washington,

W. V. D. December 10, 1900.

The Governor of Hawaii.

Sir:—

Referring to your letter of this 13th ultimo, enclosing a statement by the Commissioner of Public Lands of his views

respecting the authority of the Hawaiian officers over the public lands in Hawaii, I transmit herewith a copy of a letter of the 4th instant, to the Attorney General, from the Assistant Attorney General assigned to this Department, which expresses the views of the Assistant Attorney General upon the question discussed by the Commissioner of Public Lands in the statement above named. The views of the Assistant Attorney General were reached after a consideration of the statement prepared by the Commissioner of Public Lands and of a like statement, but reaching a different conclusion, prepared by the United States Attorney for the District of Hawaii.

The views of the Assistant Attorney General, as expressed in his letter of the 4th instant, have my approval.

Very respectfully,

(Signed.) E. A. HITCHCOCK,
Secretary.

DEPARTMENT OF THE INTERIOR

Office of the Attorney General,
Washington,
December 4, 1900.

The Attorney-General.
Sir:—

Answering your letter of the 3rd instant, enclosing a letter of the ultimo from the United States Attorney for the District of Hawaii, together with a brief prepared by him and copies of correspondence, all relative to the authority of the public officers of the Territory of Hawaii to sell, lease or otherwise dispose of public lands in the Hawaiian Islands, I have read the enclosures named, but I do not agree with the United States Attorney in his conclusion that the public officers of the Territory of Hawaii are not authorized to sell, lease or otherwise dispose of public lands in the Hawaiian Islands. While the grant of

authority could have been more plainly stated, it seems to me that the question is free from difficulty, and that subject to certain specified changes and amendments the Act of April 30, 1900 (31 Stat., 141), continues in force "the laws of Hawaii relating to public lands, and thereby provides a system whereby the public lands in those islands may be disposed of until Congress shall otherwise provide." These public lands are not granted to the Territory, but Congress in the exercise of its power and discretion has made the Hawaiian officers and Hawaiian laws, subject to the changes and amendments specified, its instruments for the time being for the disposal of these lands.

In your letter to me it is said "he (United States Attorney) seems to have come to a conclusion opposed to that in your report of July 10, 1900, to the Secretary of the Interior."

There was no report, letter or opinion from me upon this subject at or about the time named, but I find a letter from Acting Secretary Ryan to the Governor of Hawaii, dated July 27th last, and an opinion from myself to the Secretary of the Interior, dated October 16th last, both of which may be said to be opposed to the general views expressed by the United States Attorney for Hawaii.

If this communication does not answer the purpose intended to be effected by your letter to me, I will be glad to await your further direction in the premises.

Herewith are the papers accompanying your letter.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney General.

EDWARD S. BOYD,
Secretary of the Commission of Public Lands.

APPENDIX II

OPINION LETTER OF THE ASSISTANT ATTORNEY GENERAL TO THE SECRETARY OF THE INTERIOR AND LETTER FROM THE SECRETARY OF THE INTERIOR TO THE GOVERNOR OF THE TERRITORY OF HAWAII APPEARING IN THE REPORT OF THE COMMISSIONER OF PUBLIC LANDS FOR THE YEAR 1902.

Department of the Interior,
Office of the Assistant Attorney-General,
Washington, April 4th, 1902.

The Secretary of the Interior.

Sir:—

You have referred to me, for consideration and appropriate action, the application of James Walter Jones of Honolulu, Hawaii, made to the officers of the Territory of Hawaii, if granted by them, would create an easement upon a portion of the public lands in said Territory, coupled with a right to take from adjacent lands during the existence of the easement, earth, rock and timber — the easement and right to be used for the purpose of constructing, and operating all the works necessary to supply water for irrigating lands, developing power, and for domestic purpose.

The applicant proposes to pay to the Territory, as compensation for the granting of the easement sought, a yearly sum ranging from $1,000 to $2,500, and further proposes to furnish and sell water for domestic and agricultural purposes to those who are acquiring or leasing public lands and to owners of private lands, the rates therefor to be uniform and to record to certain specified standards.

It seems that the officers of the Territory are willing, and deem it advisable for the best interests of the Territory, to grant the application, but have withheld final action pending consideration.

Two questions are presented for consideration: (1) Have the Territorial officers power to grant an easement upon and over Public Lands of the Territory for the purposes named in the application, and if so, may they authorize the grantee thereof to take from adjacent land during the life of the easement, earth, rock and timber, the same to be used in the construction, maintenance and repair of the improvements to be erected, (2) Is it necessary for this Department to approve the application?

By the joint resolution of July 7, 1898 (30 Stat. 750), accepting the cession of the Hawaiian Islands, it is provided that:—

The existing laws of the United States relative to Public Lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition.

Section 73 of the Act of April 30, 1900 (31 Stat. 141, 154), providing a Government for the Territory of Hawaii, continued in force with certain modifications to conform to changed conditions, the laws of Hawaii relating to Public Lands which were in existence at the date of the passage of the aforesaid joint resolution. Among the provisions thus modified and continued in force are the following, being a part of sections 169 and 193 and subdivision of section 186 of the Civil Laws of Hawaii, of 1897:—

Section 169. The Commissioner of Public Lands, by and with the authority of the Governor and Attorney-General, shall have power to lease, sell or otherwise dispose of the Public Lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the Territory, subject, however, to such restrictions as may, from time to time, be expressly provided by law.

Sect. 186. Sub. 6. A "land license" means a privilege granted the Territory for the occupation of land for cer-

tain special purposes, such as the cutting and removal of timber, the removal of soil, sand, gravel or stone.

Sec. 193. The Commission of Public Lands have power from time to time to establish forms of all instruments necessary for carrying out this Act,....and to make, alter and revoke rules and regulations....for the granting of land licenses, etc.

The above are the only provisions of the laws of said Territory under which it may be claimed that the power to grant the authority requested exists. So far as I am informed these statutory provisions have not received judicial interpretation, but it has been shown that, prior to the establishment of the Provisional Government of Hawaii, the officers of the Kingdom, charged with the administration of the Public Land laws, and under provisions similar to the above, granted applications of the character under consideration. Further, that the executive officers of the Republic, under the aforesaid provisions, have heretofore claimed and exercised the same power, and that since annexation the Territorial officers have granted similar applications. The construction thus given to said provisions, and to provisions of similar import, is entitled to respectful consideration, and should not be disregarded without good reasons. United States *v.* Moore (95 U.S., 760, 763).

In determining the extent of the power intended to be conferred upon the officers named in said section 169, two questions are presented for consideration, viz. (1) Will the establishment of works to supply water for irrigation, power, and domestic purposes in the Hawaiian Islands protect agriculture therein, or conduce to the general welfare of the Territory? (2) Is the power to grant an easement included within the power given to lease, sell, or otherwise dispose of the public lands?

It is well known that a large part of the Islands is arid or semi-arid, and incapable of cultivation without irriga-

tion. The histories of other countries, and the development of our own, demonstrate that the establishment, maintenance, and operation of irrigation works in arid and semi-arid regions promote and protect agriculture and enhance the general welfare of the state. This fact has long been recognized by Congress and by the people of the Rocky Mountain region and Pacific Slope, as is evidenced by Constitutional provisions adopted, and Congressional, State, and Territorial legislation enacted, to promote, encourage, and protect irrigation enterprises; it has been recognized by the courts, as will appear by reference to judicial approval, construction, and application of such laws; it has been recognized by the law making power of Hawaii, as will be seen in its laws relative to the exercise of the right of eminent domain, where power is conferred to take private property for the purpose of "constructing dams, reservoirs, canals, ditches, flumes," etc.

It is now universally conceded that an enterprise which has for its object and purpose, and which is calculated to reclaim from their desert character and bring under cultivation, lands situated in an arid or semi-arid region, is an enterprise that promotes agriculture and adds to the wealth of the community; and it has been too long, and is now too well settled, by high judicial authority, to admit of discussion, that water works used for developing power or for supplying water for domestic purposes are for the benefit of the public. It follows that, under said section 169, the officers therein named are given the power to lease, sell, or otherwise dispose of Public Lands for the construction, maintenance, and operation of such works as are mentioned in the application.

The power to encumber the Public Lands by the granting of an easement, while not in specific terms given by the section, is clearly included in the words employed. As is plainly evident, the purpose of the section is to protect and

promote important and beneficial public objects, and should be construed liberally in favor of the public interests, if this can be done without violence to its terms, (Sutherland, Stat. Sec. 443). Applying this well settled rule of statutory, construction to the words employed, there can be no doubt that the legislature intended to confer the minor power of granting an easement when it invested the officers of the Territory with authority *to lease or otherwise dispose* thereof. This view of the meaning of the words employed is strengthened by judicial decisions (as will be seen by reference thereto) wherein are construed terms of similar import in the Federal Constitution and in Act of Congress.

Art. 4, Sec. 3, of the Federal Constitution provides:—

That Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.

In passing upon this provision the Supreme Court, in U. S. *v.* Gratiot et al (14 Det., 526, 537), held that it authorized Congress to enact laws for the leasing of the public domain.

By Act of March 3, 1819 (3 Stat., 520), the Secretary of War was authorized under the direction of the President, to cause to be sold certain military sites. By a subsequent Act, passed April 28, 1828 (4 Stat., 264), the President was authorized to sell certain lands which had been conveyed to the Government for forts, arsenals, dockyards, lighthouses, or any like purpose, etc.

In November, 1838, the Secretary of War entered into a contract with the President of the Baltimore and Ohio Railroad Co., by the terms of which authority, for an indefinite period, was granted to the company, among other things, to construct its railroad over and across lands of the Government included in the site of Harper's Ferry Military Arsenal. Under said agreement the company en-

tered upon and constructed its line of railroad over and across said lands, and operated said railroad continuously thereafter. Subsequently an action was instituted by the Government against the company to cancel the aforesaid agreement, principally upon the ground of want of power in the Secretary of War to enter into the same. The court dismissed the bill, holding that the Secretary of War "being invested with authority to dispose of it (the site) by grant in fee, all minor powers over the property are necessarily implied;" and that the railroad company, as well as the public through it, had "acquired an easement in the property, so long as it continues to use it for the purposes granted." U. S. *v.* Baltimore & Ohio Railroad Co. (1 Hughes, 138, S. C; 24 Fed. Cas., 973, 975).

Taking into consideration the language employed in the said section 169 and the rule of construction applicable to the same, I am of opinion that the power conferred thereby to lease, sell, *or otherwise dispose of* the Public Lands includes authority to grant an easement upon, over, and across them.

An easement which is granted for the purpose of erecting and maintaining a public or *quasi-public* improvement necessarily carries with it a right to remove so much of the soil, rock, and timber from the land subject thereto as may be necessary in the construction and maintenance of such improvement, but ordinarily such easement does not confer the right to indiscriminately use soil, rock and trees from adjacent lands for the purposes of construction, maintenance, and repair of such improvement.

But it is clear to me that by Sections 186 and 193 of said civil laws, the territorial officers are expressly authorized to grant a right to use earth, rock and timber upon adjacent public lands for the purpose of constructing, maintaining and repairing the improvements agreed to be erected by the applicant.

While I recognize that a "license" in its restricted legal sense, means a liberty or privilege upon the lands of another, to be enjoyed at the will of the party who gives it, and that the privilege here sought is not intended to be thus revocable, yet a license, in its enlarged sense, may include a privilege coupled with an interest, in which case it is not revocable at the will of the licensor.

This enlarged sense was evidently intended by the legislature of Hawaii to be included in the term "license" as used in the Statutes. After defining, in section 186, what a "land license" is, the legislature, by section 193, conferred upon the Commissioner of Public Lands power to make rules and regulations for the granting of the same; and in section 198, subdivision 4, recognize that contracts may be made respecting "license, or other disposition of public lands." The employment of the words "granting" and "contracts" relative to "land licenses," shows that the legislature contemplated that such licenses might be issued coupled with an interest in the grantee.

The power to grant the authority asked is conferred upon the officers of the territory by the local laws which Congress, by express direction, has continued in force, and the exercise of the power in no way depends upon the action of this department; hence, it is not necessary that the application should be approved by you.

In the application it is conditioned, among other things, that the privileges asked for, if granted, shall, within five years be surrendered to the Territory, and when surrendered be immediately issued to a corporation to be formed for the purpose of owning, maintaining and operating said works. I do not feel called upon to say whether or how such an easement or privilege as it is here sought may be transferred or conveyed to another, but I do feel constrained to say that the latter part of this provision is objectionable. The present officers cannot bind their successors or Congress in that way.

I am of the opinion, and so advise you, that the privileges requested by the applicant are within the power of the officers of the Territory to grant, and that it is not necessary for you to approve the application.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney General.

APPROVED:
April 4, 1902.
(Signed) E. A. HITCHCOCK, Secretary.

The opinion mentioned in the communication from the Secretary of the Interior as rendered by the Assistant Attorney General is substantially as above recited.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, April 5, 1902.

THE GOVERNOR OF HAWAII,
Honolulu, Hawaii.

Sir:—Referring to former correspondence relating to the authority, under existing law, to grant rights of way through the public lands in Hawaii for ditches, canals, and reservoirs, to be used in the storage and conveyance of water for irrigation and kindred purposes, I enclose herewith, for your information and guidance, an opinion, dated the 4th instant, rendered by the Assistant Attorney General for this Department, approved by me, wherein it is held that, under existing legislation, such rights of way may be granted by the Territorial officers.

In this connection it should be said, that the duty and the entire responsibility of acting upon and disposing of applications for such rights of way rest upon the Territorial officers, and my duty in the premises is only of that advisory character which inheres in a superior officer. The form of agreement or arrangement with Mr. James Walter Jones, which is submitted with one of your letters, is such that I

desire to make some suggestions, born of my observation in the Department here, which may be of advantage to you and the Territory in your further disposition of matters of this kind.

It has been found necessary, if not indispensable, to the best results that there should be a prescribed width for each right of way such as ten or twenty-five feet on each side of the center line of the ditch, canal or water way, and that the taking of earth, stone and timber, for use in construction and repair, should be confined to lands embraced in the right of way, save in very exceptional instances, and then to be confined to other lands either specifically described at the time of granting the right of way or to be determined upon by public authority when the necessity therefor arises. It has been the exception, and may be of questionable propriety, to provide for the taking of timber for any purpose other than original construction, except from the lands embraced within the prescribed right of way. The sites of reservoirs should have some prescribed maximum area, and should be confined to the ground intended to be overflowed and to be a reasonable amount of adjacent ground sufficient for the proper maintenance of the reservoirs and the collection and retention of waters therein. There should be an absolutely accurate and definite location of the grounds to be included in reservoirs and dam sites and in the right of way, delineated upon some character of map to be filed within some limited time, and to be subject to the approval of the proper Territorial officer or officers. Such a map should bear upon its face, or in accompanying field notes, such a statement of the location and courses and length of the boundaries of the lands to be taken as would readily enable a surveyor to accurately mark and locate in the field the ground to be taken or affected. These matters have been found by experience to be necessary in order to distinguish and segregate the land encumbered from that

which is not encumbered, and therefore to enable the proper authorities, as well as private individuals, in subsequent dealings with respect to the public lands, to avoid conflicting grants and confusion in title. It is also common to provide that the grantees of such rights of way shall be charged with the duty of constructing and maintaining proper bridges and crossings at all intersections of public highways. Another feature common to transactions of this kind is the requirement that the dams, reservoirs, and canals, shall be constructed according to plans to be approved by some designated officer, and so maintained, under that officer's supervision, as to avoid injury to other public and private lands by reason of overflow or washing due to breaks caused by imperfect construction or careless maintenance.

Whether the rental or yearly income to the Territory indicated in the proposed agreement is an adequate one is a matter which deserves careful attention, especially considering the long period of the easement; and the Territorial officers, who are or should be, familiar with the locality and the private and public interests to be affected, are in a better position than any one here to properly determine this question.

Very respectfully,

(Signed) E. A. Hitchcock,
Secretary.

APPENDIX III

71ST CONGRESS, 2D SESSION, SENATE, REPORT No. 866

Payment into Territorial Treasury of Rentals from Executive Department Lands.

May 29 (calendar day, June 6), 1930. — Ordered to be printed.

Mr. Bingham, from the Committee on Territories and Insular Affairs, submitted the following

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REPORT

(To accompany H. R. 11134)

The Committee on Territories and Insular Affairs, to whom was referred the bill (H. R. 11134) to amend section 91 of the act entitled 'An act to provide a government for the Territory of Hawaii,' approved April 30, 1900, as amended, having considered the same, report favorably thereon and recommend that the bill do pass.

This is a bill to provide that where public lands of the Territory of Hawaii are taken for the uses and purposes of the United States and thereafter are leased, rented, or granted upon revocable permits to private corporations or individuals, that the rentals shall be covered into the treasury of the Territory of Hawaii, to be used for the purposes enumerated in the organic act.

By the organic act all the public lands of Hawaii were placed under the administration and control of the governor and the Territorial commissioner of public lands. The income of these lands goes to the Territorial treasury.

Public lands may be set aside for public purposes by an executive order of the governor of the Territory. The

President may, by Executive order, transfer public land from one department to another for public purposes.

The obvious intent of the law authorizing Executive orders is to provide departments of the Territory and departments of the Federal Government with such land and public property as may be necessary to facilitate the service of the governmental agencies. It may properly be assumed that it was not the intention of such a law to make possible the placing of valuable lands in the hands of one department, there to lie idle, unused, when by transfer to other departmental control the land would be actively devoted to a public use, either as a source of direct revenue or a saving of money through the accommodation of some branch of public service.

Under this authority, more than 160,000 acres of public land of the Territory of Hawaii have been transferred from the uses of the Territory to Federal departments. About 300 acres have been returned to the Territory by Executive order.

Summary of the lands transferred to Federal departments shows that up to June 30, 1929, there have been transferred from the uses of the Territory of Hawaii to the uses of Federal departments 163,163 acres of public lands.

Of this amount, 20,582 acres have been transferred to the War Department.

Of this acreage of 20,582 acres transferred to the War Department, the following areas, not in military use, have been leased, rented, or granted upon revocable permits to private parties:

Leased to—	Location	Acreage	Expiration date of lease	Rental
California Packing Corporation	Schofield	375.09	Jan. 1, 1933	$4,605.75 per annun
Honolulu Planting Co.	Aiea	8.808	June 30, 1930	$15 per acre per an.
Chock Look	Shafter	(1)	May 15, 1934	$500 per annum
S. M. Damon estate	—do—	8.2	Aug. 19, 1932	$21 per acre per an.
Kaneohe Ranch Co.	Kuwaaohe	300.77	Dec. 13, 1933	$175 per annum
Waimanalo Sugar Co.	Waimanalo	229.41	Apr. 10, 1932	$2,064.70 per annun

1 Fish pond.

The total yearly rental amounts to $7,649.77, which sum is deposited to the credit of the United States in the United States Treasury.

The position of Governor Judd, of the Territory of Hawaii, is shown by the following:

Territory of Hawaii
Honolulu, March 7, 1930.

Hon. V. S. K. Houston,
Delegate in Congress from Hawaii,
Washington, D. C.

Dear Delegate Houston: In reply to your letter of February 19, 1930, inclosing copy of letter received from the Secretary of War, in which he gives the attitude of the department with respect to its leased lands in the Territory, I have given the matter considerable thought and have conferred with the commissioner of public lands on this subject.

According to your letter to the Secretary of War of October 8, 1929, the total amount of such rentals now being collected annually and paid into the Federal Treasury is $7,649.77.

The amount of these rentals is relatively small, and I note from list of leases included in your letter of October 8, that many of the leases, including the larger ones, expire in less than two years from date, leaving a very small income unless the leases are renewed. However, whatever proceeds the Territory might derive from this source would be helpful, and if you feel that the end sought could be accomplished by an amendment to the organic act, I recommend that the attempt be made.

Yours respectfully,

Lawrence M. Judd,
Governor of Hawaii.

The War Department's attitude is given in the following:

War Department,
Washington, D. C., February 14, 1930.

Hon. V. S. K. Houston,
House of Representatives, Washington, D. C.

Dear Mr. Houston: Replying to your letter of January 28, 1930, permit me to advise you that it is essential that the War Department retain control of its leased lands in Oahu.

Although War Department lands may be leased to private control under the act of July 28, 1892 (27 Stat. 321), this is a temporary condition since all leases provide that they may be revoked at the discretion of the Secretary of War, thus making the lands available on a short notice.

Should these lands be transferred by Executive order to the Territory of Hawaii, with the provision that they be given back to the War Department when needed, and then leased to private control, which is the object of the Territory in obtaining the lands, the War Department could not secure the lands for military use during the life of the lease, since section 73 (d) of the organic act provides that agricultural lands leased by the Territory may only be revoked for homestead or public use.

Under the present law as expressed by section 3621 of the United States Revised Statutes, all funds derived from rental of War Department lands must be deposited in the Treasury of the United States. The War Department has no option in this matter, but after the funds have been deposited in the general fund of the Treasury there may be a method or procedure by which the Treasury Department can deposit the money to the credit of the Territory of Hawaii. This is a matter of bookkeeping within the Treasury Department. If no such procedure exists, it appears that the proper recourse is for you to secure congressional action by having the joint resolution to provide for annex-

ing the Hawaiian Islands to the United States, approved July 7, 1898, modified to provide that funds derived from the rental of any of the excepted lands mentioned therein, shall be deposited to the credit of the Territory of Hawaii.

The War Department will not oppose this action.

Sincerely yours,

PATRICK J. HURLEY,
Secretary of War.

The Secretary of the Interior's approval is given in the following:

Department of the Interior,
Washington, April 1, 1930.

HON. CHARLES F. CURRY,
Chairman Committee on the Territories,
House of Representatives.

My Dear Mr. Chairman: Referring further to your request of March 27 for a report on H. R. 11134, which would amend the act of April 30, 1900, providing for a government of the Territory of Hawaii, I have to inform you that, in my judgment, the passage of this bill would be in the interest of good administration. Its favorable consideration is therefore recommended.

Very truly yours,

RAY LYMAN WILBUR, Secretary.

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APPENDIX IV

61ST CONG. 2D SESS. H. R. REPORT No. 910

Amending Organic Act of Hawaii.

March 30, 1910.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Hamilton, from the Committee on the Territories, submitted the following

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REPORT

(To accompany S. 3360.)

The Committee on the Territories, to whom was referred the bill (S. 3360) to amend an act entitled 'An act to provide a government for the Territory of Hawaii,' approved April thirtieth, nineteen hundred, having had the same under consideration, report it back with the recommendation that it do pass, with amendments as follows: [Amendments then are reported, including the insertion of a proposed section 7, amending section 86 of the Organic Act which section subsequently was dropped. However this proposal caused the section amending section 91 of the Act to be referred to in this report as section 8; as finally enacted it was section 7 of the bill.] * * * *

* * * *

Section 8 of the bill amends section 91 of the organic act, which provided that the public property ceded to the United States upon annexation remains in the control of the Territory, subject to the power of the President or the governor to set aside portions of it from time to time as required for the uses and purposes of the United States. The real property may be sold or leased by territorial officers under the Hawaiian laws, which were continued in

force by sections 73 and 75 of the organic act, and the personal property may likewise be sold or leased by territorial officers under the authority of the act of May 26, 1906 (34 Stats., 204), and the proceeds of all such sales and leases go into the Hawaiian treasury. In other words, all such property now belongs practically or equitably to the Territory, except that the technical or legal title is in the United States and needed portions may be set aside by the President or the governor for the use of the United States. This section is amended principally in three respects.

(1) In some cases property has been set aside by the President as a matter of precaution on the chance that it might afterwards be found to be needed by the Federal Government, but has since been found not to be needed; or property that has been so set aside has been found to be needed only temporarily. The proposed amendment permits such property to be restored to its previous status, but only by the President.

(2) At present the Territory has public schools and other public buildings and works, upon lands the title to which is technically in the United States; it is constantly expending money on these in repairs, additions, and new buildings and works. It is also constantly constructing new buildings and works on lands hitherto unused. It seems only right that the Territory should have the title to the lands upon which it expends its money for public improvements. The proposed amendment permits the President to transfer to the Territory such public property as is now used or money hereafter to be required by it for public purposes.

(3) As local governments are established and developed such public property as may be needed for the exercise of their functions should be turned over to them. The amendment permits this to be done by the governor when authorized by the legislature.

At present there is more or less confusion. In many cases, for instance, the title is in the United States, the

responsibility of the care and management is in the Territory, and the actual possession and use is in the city or county government. The amendment will make it possible to remove all confusion and put things on a business like basis.

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APPENDIX V

79TH CONG. 2D SESS. HOUSE OF REP. REPORT No. 2462

Amending paragraph (L) of section 73 of the Hawaiian Organic Act, as amended

July 8, 1946.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Larcade, from the Committee on the Territories, submitted the following

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REPORT

(To accompany H. R. 3361)

The Committee on the Territories, to whom was referred the bill (H. R. 3361) to amend paragraph (l) of section 73 of the Hawaiian Organic Act, as amended, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

On page 2, line 2, insert, between the words 'to' and 'the', the words 'war or'.

On page 2, at the end of line 2 and the beginning of line 3, omit the words 'or the prosecution of the present war'.

The purpose of this bill is to amend section 73 (l) of the Organic Act of the Territory of Hawaii so that in cases where purchasers of land are unable to fulfill all of the

conditions of the purchase, for reasons relating to the prosecution of the war or national defense, they shall not forfeit said lands and shall be allowed an extension of the period during which any of the conditions of the sale of said lands may be complied with that is equal to the period in which they had been prevented from meeting these conditions so as to relate only to national defense and the prosecution of the present war. It has been amended so as to retain the same reference to national defense but eliminates the limitations as to 'the present war'.

The measure is presented therefore to provide authority to meet problems that might very readily arise in the future in view of the great military importance of the islands of the Hawaiian group.

The bill is the outcome of a situation that exists as a direct result of the war.

The Territory of Hawaii, acting under authority of the organic act, sold a piece of land in the industrial area of Honolulu to one of the large canning companies under the condition that within a specified period a warehouse would be constructed on this property. The company fully intended to carry out this condition of purchase but was prevented from doing so by the outbreak of war. The land was taken over by the United States for storage space and, in consequence of this and conditions resulting from the war, the company was unable to proceed with the construction of the warehouse.

The enactment of this legislation would protect purchasers in their title to lands in purchases of this kind and would moreover assure the Territory that the conditions of the sale would be carried out in the proper time.

The legislation has the approval of the administrative officials of the Territory of Hawaii.

It is recommended, with the amendments, by the Acting Secretary of the Interior, in a letter dated December 14,

1945, addressed to the chairman of the Committee on the Territories, as follows:

Department of the Interior,
Washington, December 14, 1945.

My Dear Mr. Peterson: Reference is made to your request for a report by this Department on H. R. 3361, a bill to amend paragraph (l) of section 73 of the Hawaiian Organic Act, as amended.

The proposed legislation would assure purchasers under the Hawaiian Homes Commission Act that, in cases where covenants or conditions contained in their grants have been, or may be rendered impossible of fulfillment by reason of privileges granted to the United States for war or defense purposes, the failure to comply will not result in forfeiture and that their time to satisfy such covenants or conditions will be appropriately extended.

Although there is an inconsistency, apparently inadvertent, in the bill, if corrected as herein suggested I would recommend its favorable consideration by your committee.

The rights of these purchasers should not, of course, be jeopardized because of their patriotic cooperation with the Federal Government during a war or defensive emergency. However, the diversions of use listed as excusing a failure to perform the conditions of a grant are those 'relating to the national defense or the prosecution of the present war.' It is to be noted that, while the war referred to is 'the present war,' no such limitation is placed upon the period of 'national defense.' Accordingly, H. R. 3361, if enacted, would excuse nonperformance in the future based upon the necessities of the national defense but not upon the prosecution of a war. If you agree that the proposed legislation should not be so limited, this limitation could be removed by inserting, between the words 'to' and 'the' on page 2, line 2, the words 'war or', and by omitting, on the

same page at the end of line 2 and the beginning of line 3, the words 'or the prosecution of the present war'.

Due to my understanding that a hearing on this bill has been scheduled by your committee for December 14, this letter is being sent to you prior to its submission to the Bureau of the Budget, and, therefore, I have not been advised by that agency concerning the relationship of the views expressed herein to the program of the President.

Sincerely yours,

ABE FORTAS,
Acting Secretary of the Interior.

Hon. Hugh Peterson,
Chairman, Committee on the Territories,
House of Representatives.

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The bill which was the subject of this report became the Act of August 7, 1946, reading as follows:

Public Law 616, 79th Cong. 2d Sess. (H. R. 3361),
59 Statutes at Large c. 771.

AN ACT

To amend paragraph (1) of section 73 of the Hawaiian Organic Act, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (1) of section 73 of the Hawaiian Organic Act, as amended, is amended by inserting before the period at the end thereof a colon and the following: 'Provided further, that in case any lands have been or shall be sold pursuant to the provisions of this paragraph for any purpose above set forth and/or subject to any conditions with respect to the improvement thereof or otherwise, and in

case any said lands have been or shall be used by the United States of America, including any department or agency thereof, whether under lease or license from the owner thereof or otherwise, for any purpose relating to war or the national defense and such use has been or shall be for a purpose other than that for which said lands were sold and/or has prevented or shall prevent the performance of any conditions of the sale of said lands with respect to the improvement thereof or otherwise, then, notwithstanding the provisions of this paragraph or of any agreement, patent, grant, or deed issued upon the sale of said lands, such use of said lands by the United States of America, including any department or agency thereof, shall not result in the forfeiture of said lands and shall result in the extension of the period during which any conditions of the sale of said lands may be complied with for an additional period equal to the period of the use of said lands by the United States of America, including any department or agency thereof.'

Approved August 7, 1946.